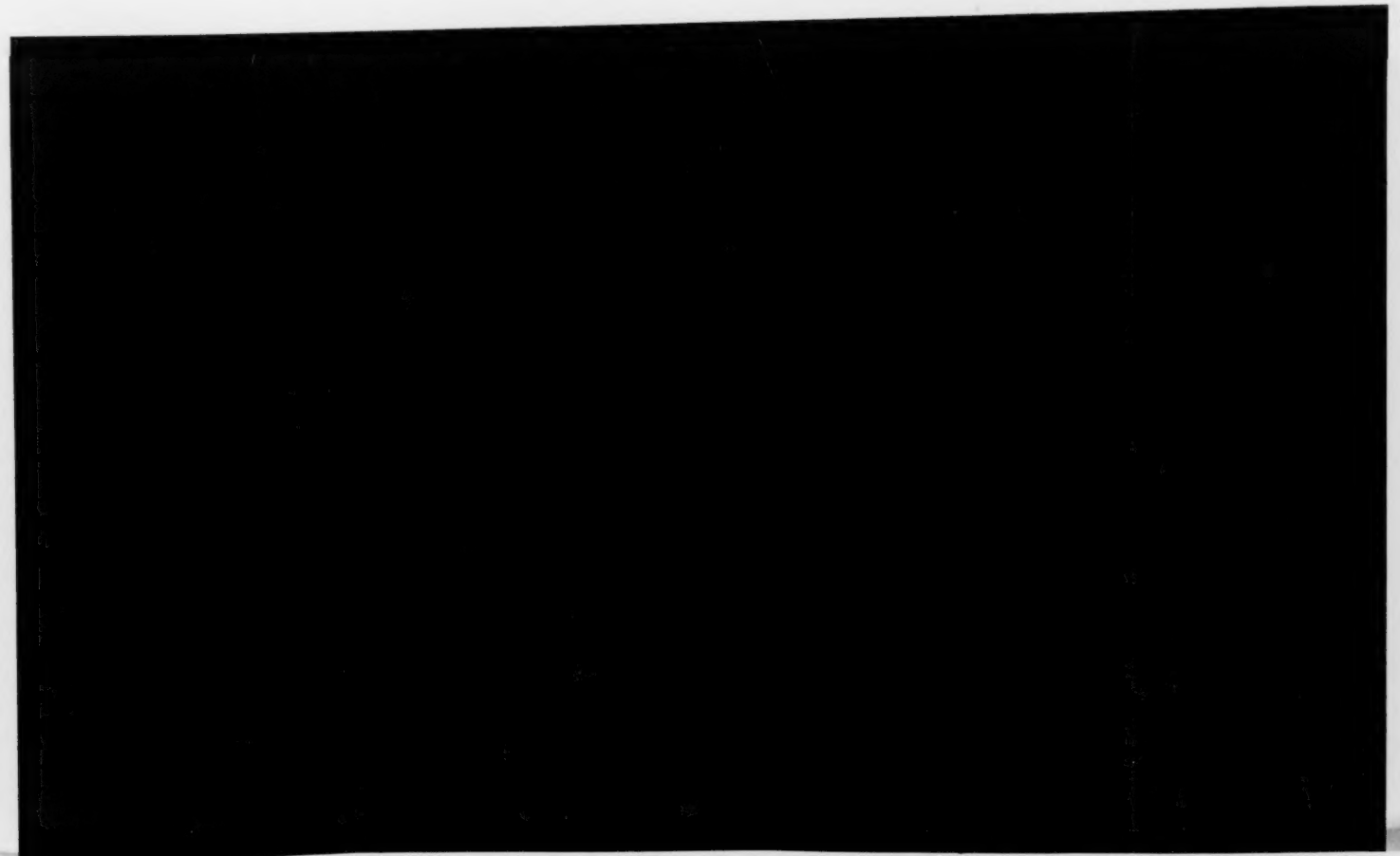

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274240—40——1

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 509

FRANK MORGAN, ADMINISTRATOR OF THE ESTATE OF WILLIAM NICHOLAS, PETITIONER

v.

FRANK T. HINES, AS ADMINISTRATOR OF VETERANS' AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The judgment of the United States District Court for the District of Columbia was entered without opinion (R. 13). The opinion of the United States Court of Appeals for the District of Columbia (R. 17–21) is reported in 113 F. (2d) 849.

JURISDICTION

The judgment of the Court of Appeals was entered July 15, 1940 (R. 21–22). The petition for

a writ of certiorari was filed October 15, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Administrator of Veterans' Affairs has power to review the findings of the Insurance Claims Council of the United States Veterans' Administration on his own motion.

STATUTES AND REGULATIONS INVOLVED

The applicable portions of the statutes and regulations involved are set forth in the Appendix, *infra,* pp. 12–16.

STATEMENT

Petitioner is the administrator of the estate of William Nicholas, a World War veteran who died on September 4, 1926 (R. 10). He brought this suit in the United States District Court for the District of Columbia on July 3, 1935, seeking a writ of mandamus to compel the respondent to pay benefits under a contract of yearly renewable term insurance issued to Nicholas, on the ground that the Insurance Claims Council of the Veterans' Administration, in a final and unreviewable decision, had found the insurance to have matured by total permanent disability on December 5, 1918, and that, accordingly, it was the ministerial duty of the respondent to pay insurance benefits (R. 1, 2, 3, 12).

The suit was dismissed upon the respondent's demurrer to petitioner's amended replication (R. 13). The record consists entirely of the pleadings, including the petition (R. 1–4), answer (R. 5–8), replication (R. 8–12), and respondent's demurrer (R. 12). Petitioner appealed from the judgment dismissing his suit (R. 13–14) and the Court of Appeals for the District of Columbia unanimously affirmed that judgment (R. 21–22).

The record discloses that Nicholas had an insurance contract in the sum of $10,000 in force on December 5, 1918, when he was discharged from the United States Army on a surgeon's certificate of disability (R. 1). A claim for insurance benefits was filed in the Veterans' Administration by the petitioner on June 4, 1932 (R. 5, 9).[1] The Insurance Claims Council of the Veterans' Administration found, on October 27, 1932, that the insured was totally permanently disabled, within the meaning of his war risk insurance contract, on December 5, 1918 (R. 2).[2] No award under this decision was ever made (R. 6).

Petitioner's claim was pending in the Veterans' Administration on March 20, 1933, when the Economy Act (Act of March 20, 1933, c. 3, 48 Stat. 11) was approved. Section 17 of that

[1] No reference is made in the record or the petition for a writ of certiorari to any prior claim for insurance benefits.

[2] The Insurance Claims Council, for reasons not disclosed by the record, reviewed the case on September 25, 1933, and again on September 15, 1934, affirming its decision of October 27, 1932 (R. 10).

Act (U. S. C., Title 38, Section 717) provided for the repeal of "all laws granting or pertaining to yearly renewable term insurance". Subsequent to the decision of this Court in *Lynch* v. *United States* and *Wilner* v. *United States,* 292 U. S. 571,[3] holding unconstitutional the provisions of the Economy Act which had sought to cancel yearly renewable term insurance contracts, the respondent directed a reexamination of the petitioner's claim. Additional evidence was obtained and oral hearings were held before the Board of Veterans' Appeals, at which petitioner was represented. The respondent determined that the evidence did not warrant a finding that Nicholas had been totally permanently disabled within the meaning of his policy and during its life, and accordingly denied petitioner's claim (R. 7).

ARGUMENT

Petitioner contends that the finding by the Insurance Claims Council of the Veterans' Administration that the decedent was totally permanently disabled on December 5, 1918, conferred upon him a vested property right. He asserts that under the regulations of the Veterans' Administration the Administrator was powerless to review a finding by the Council except upon an appeal by the claimant, and that the attempt on the part of the Administrator of Veterans' Affairs to review on his own motion the finding in ques-

[3] Decided June 4, 1934.

tion was without authority and void.[4] He urges that the respondent had only the ministerial duty of paying the petitioner's insurance claim on the finding by the Council and hence that he should have been granted a writ requiring the respondent to perform this duty. All of these contentions were considered and, we submit, properly rejected by the court below.[5]

As the court below points out in its opinion (R. 18), proper administration of the World War Veterans' Act requires the possession by the Administrator of the power to reexamine the findings of his

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[4] Petitioner does not contend that the Administrator denied him an opportunity to be heard in connection with the review of the decision of the Insurance Claims Council, or that the Administrator's finding that the insured was not totally permanently disabled was not warranted by the evidence before the Administrator.

[5] The petitioner complains (Pet. pp. 12–13) because the court below, in a footnote of its opinion (Second Paragraph of Footnote 4, R. 18–19), considered the affirmative allegations in the respondent's answer to the effect that the Administrator gave petitioner due notice and opportunity to be heard. Since no question is raised as to the adequacy of the hearing but only as to the Administrator's power to review at all on his own motion, it is immaterial whether the affirmative allegations of the answer should have been ignored. It may be observed, however, that those allegations were not denied in petitioner's replication and the court was at liberty to accept them as true. Respondent was compelled to answer the rule to show cause, and could not demur to the petition. *United States ex rel. West* v. *Hitchcock*, 19 App. D. C. 333. The replication failed to challenge these affirmative allegations, and a demurrer in such circumstances brings the entire record before the court. *United States* v. *Gurney*, 4 Cranch 333, 341.

subordinates on his own motion. *Knight* v. *United States Land Association,* 142 U. S. 161, 177–178; *Orchard* v. *Alexander,* 157 U. S. 372, 385. If the Administrator does not have this authority it would be impossible for him to do justice by reversing on his own motion an erroneous decision adverse to a claimant.[6] The court below correctly found the necessary authority to have been conferred upon the Administrator in the broad language of Section 5 of the World War Veterans' Act (Appendix, *infra,* p. 12), which provides:

> The director, [administrator] * * * shall administer, execute, and enforce the provisions of this Act * * * and shall decide all questions arising under this Act; and all decisions of questions of fact and law affecting any claimant * * * shall be conclusive except as otherwise provided herein. All officers and employees of the bureau shall perform such duties as may be assigned them by the director. All official acts performed by such officers or employees specially designated therefor by the

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[6] As was said by the court below in Footnote 2 of its opinion (R. 17):

"It should be noted that acceptance of this [petitioner's] argument would preclude the Administrator from reviewing, on his own motion, decisions adverse to the claimant as well as those favorable to him. It would seem hard to say the Administrator does not have sufficient authority to allow on his own motion a claim for compensation, pension, vocational rehabilitation, or insurance benefits erroneously denied by his subordinates."

> director shall have the same force and effect as though performed by the director in person. * * *

The Insurance Claims Council was created by the Administrator and has no power except that conferred upon it by the Administrator. The Council acts for him and, within the limitation of the authority delegated to it, its action is the action of the Administrator. Implicit in the authority to act is the authority to correct an action. See *United States* v. *Bentley,* 107 F. (2d) 382, 383 (C. C. A. 2d), in which it was held that a statute making a decision of the Secretary of War final and conclusive did not prevent the Secretary from correcting his own decision.

Petitioner places principal reliance upon a regulation (Regulation 3204, Appendix, *infra,* p. 15) containing provisions for a review by the Administrator of decisions of the Insurance Claims Council upon an appeal by the claimant, but containing no provisions for review of such decisions by the Administrator on his own motion. It may well be doubted that the Administrator could divest himself of the authority to correct an erroneous decision of his subordinates, but in any event, as the court below stated (R. 19, Footnote 5), the regulation in question—

> clearly does not purport to deal with the finality of the Council's decisions favorable to the claimant nor does it detract from the power of the Administrator to review such

> decisions on his own motion. Moreover, we think the finality of adverse decisions under this regulation is finality only in respect to the claimant and does not purport to bar the Administrator from reviewing such decisions on his own motion.

Petitioner seeks (Br. 10–11) to read into Section 2 of the Act of July 3, 1930, c. 863, 46 Stat. 1016 (U. S. C., Title 38, Section 11 (a)), providing for the consolidation in the Veterans' Administration of the Veterans' Bureau and other agencies dealing with veterans' affairs, a limitation upon the Administrator's right to review in the absence of an appeal by a claimant. That section provides that "All final decisions or orders of any division, bureau, or board in the Veterans' Administration shall be subject to review, on appeal, by such administrator." As the court below properly held, this language was "merely confirmatory of the final responsibility for administration of all Veterans' Affairs earlier lodged in the Administrator [then Director] * * * by Section 5 of the World War Veterans' Act" (R. 18). This is made clear by the provision in the same section of the Consolidation Act that "Upon the establishment of such Veterans' Administration all the functions, powers, and duties * * * conferred by law upon * * * the Director of the United States Veterans' Bureau are hereby conferred upon and vested in the Administrator of Veterans' Affairs."

Petitioner refers to the fact that on March 12, 1934, the Administrator by regulation made provision for appeal by officials of the Veterans' Administration (Br. pp. 11–12). Since, however, the Administrator, by virtue of the broad statutory grant of power in Section 5 of the World War Veterans' Act, possessed authority to review any finding of the Insurance Claims Council on his own motion, the exercise of this authority was not at all dependent upon the existence of regulations prescribing a procedure for it.[7]

The Administrator having at all times possessed authority to review any finding of the Council on his own motion, it cannot be said that the exercise of this authority in the instant case involved

[7] While the Administrator, acting under Section 35 of the Independent Offices Appropriation Act of 1934 (Appendix, *infra*, pp. 14–15), issued instructions on April 11, 1934 (Appendix, *infra*, p. 16), for the reference to him for consideration, without any application, of all claims "which would be otherwise proper for payment except for the provisions" of the Economy Act, provided that certain conditions had been complied with, the record does not disclose that he reviewed the finding of the Insurance Claims Council under this procedure. The Administrator, in his answer to the petition for mandamus, relied specifically for authority to review such finding upon "the provisions of the World War Veterans' Act, 1924, as amended, which gives him authority to administer, execute and enforce the provisions of said Act and to decide all questions arising thereunder" (R. 6–7). Since this authority amply supported his action in the instant case, it is unnecessary to rely upon other possible authority.

any modification of the procedure in effect at the time the Council rendered its decision.[8]

Petitioner's suit appears to be merely an effort on his part to escape the bar of limitations which had fallen prior to the filing in the Veterans' Administration of the claim upon which he seeks to recover as a result of this proceeding. Section 19 of the World War Veterans' Act (Appendix, *infra,* pp. 13–14), provides that in the event of disagreement as to claim under a contract of insurance, between the Veterans' Administration and a claimant, an action may be brought against the United States within six years after the right accrued for which the claim is made, or within one year after July 3, 1930, whichever is the later date. When the Administrator found that the insured was not totally permanently disabled while his insurance was in force and denied petitioner's claim (R. 7), petitioner, except for its belated assertion, could have brought a suit upon that claim under the authority of Section 19, since that section provides a suspension of limitations "for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director." Petitioner may not maintain a suit under the authority of that section only because his claim was first filed in the Veterans' Adminis-

[8] Even if it had, however, such a change in administrative procedure is not violative of the Fifth Amendment. *Paramino Lumber Co.* v. *Marshall*, 309 U. S. 370, 378–379.

tration in June 1932, more than one year after July 3, 1930, and more than six years after the right accrued. *United States* v. *Towery,* 306 U. S. 324, rehearing denied, 306 U. S. 668. The court below properly held that in the circumstances of this case the petitioner's exclusive remedy, although lost to him by the belated assertion of claim, was a suit under the authority of Section 19. Certainly petitioner's failure to bring an action under Section 19, within the time prescribed therein, provides no basis for granting relief in the instant proceeding. *United States Board of Tax Appeals* v. *McCandless,* 26 F. (2d) 1000 (App. D. C.).

CONCLUSION

The decision below is correct. There exists no conflict of decisions. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

FRANCIS BIDDLE,
Solicitor General.

FRANCIS M. SHEA,
Assistant Attorney General.

PAUL A. SWEENEY,
Special Assistant to the Attorney General.

W. MARVIN SMITH,
Attorney.

JOHN M. GEORGE,
Attorney, Veterans' Administration,
Of Counsel.

NOVEMBER 1940.